| | |
|---|---|
| Car value | $3,500 |
| Dwelling house | 430 |
| Almeirah | 28 |
| Bed | 22 |
| Total : | $3,980 |

Against this property worth $3,980 he was entitled to set off the $2,500 *harta pembawak* leaving a sum of account.

The plaintiff has to account for the following :—

| | | |
|---|---|---|
| (a) | Land held under Approved Application, value of development | $1,196 |
| (b) | Radio | 405 |
| (c) | Almeirah | 38 |
| (d) | Crockery | 6 |
| (e) | Loudspeaker | 5 |
| | Total : | $1,650 |

Since the plaintiff has to account for a greater sum than the defendant no sum is due to the plaintiff from the defendant. The defendant has not counterclaimed for any excess (which in any event would only be $85).

I do therefore give judgment for the plaintiff in the terms of her first and second prayer and order that the time within which the defendant do execute the transfers be extended to 21 days.

I do also award to the plaintiff her taxed costs of this suit.

*Order accordingly.*

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## OSMAN BIN ABDULLAH v. PUBLIC PROSECUTOR

**[C. A. (Thomson C.J., Whyatt C.J. (S) and Rigby J.) April 9, 1957]**

**[Penang — F.M. Criminal Appeal No. 52 of 1956]**

*Penal Code, ss. 34 & 302 — Murder — Prosecution invoking aid of s. 34 without framing charge thereunder — Whether failure of justice — Criminal Procedure Code (Cap. 6) ss. 152, 153, 154 and 422 — Courts Ordinance, 1948, s. 29(1).*

**The appellant in this case was convicted on the following charge: "That you on the 27th day of May, 1956, at about 7.00 p.m. at Feeder 14, Sanglang, in the District of Kubang Pasu, in the State of Kedah, committed murder by causing the death of one Inin s/o Endin Kelai and you thereby committed an offence punishable under section 302 of the Penal Code."**

**The case for the prosecution was that the appellant, the deceased and one Hashim all lived in the same village on the banks of an irrigation canal. On the evening in** question the deceased left his house to go to a nearby shop. Some time later shouts were heard from him and a sound which was described as "pok" and he was found sitting on the canal bund suffering from a head injury. In reply to questions as to who had injured him he named the appellant and Hashim. Immediately after the sound "pok" was heard and immediately before the deceased was found injured one Othman bin Din had seen the appellant and Hashim running on the bund and immediately afterwards saw the deceased lying on the ground. The deceased died later in the evening and on subsequent medical examination was found to have died from a fracture of the skull and intracranial haemorrhage caused by a blow with a heavy instrument. Later in the evening the appellant was arrested at his own house, but Hashim could not be found up to the time of trial. In the circumstances the prosecution were forced to rely on section 34 of the Penal Code. The defence was one of *alibi*, corroborated by the evidence of his father-in-law, a friend and his wife.

The assessors disagreed, but the trial Judge announced that he agreed with the one who believed the prosecution witnesses.

On appeal the conviction was attacked on a number of grounds, two of which the Court was of opinion called for consideration. One was that the learned trial Judge dealt with the question of common intention insufficiently and incorrectly and the other was that the prosecution having invoked the aid of section 34 of the Penal Code the charge should have been framed under that section and that failure to do so was a vital defect in the proceedings.

**Held:** (1) where the prosecution are proposing to invoke the section the charge should make this clear to the accused. In a case of murder, for example, the interests of justice clearly require that the accused person should know whether the case against him is that he himself struck the fatal blow or whether it is that some other person struck the fatal blow but that he was acting at the same time together with that other person and that the fatal blow was struck in furtherance of an intention which was common to them both. If this be not made clear the particulars stated in the charge "do not give the accused sufficient notice of the matter with which he is charged";

(2) in this case the charge erred against this principle. It simply stated that the accused committed murder by causing the death of the deceased. In itself it did not make it clear, or even suggest, that what it was proposed to prove against the accused was not that he struck the blow that caused the death of the deceased but that he and Hashim were acting together with a common intention to kill the deceased and that in furtherance of that common intention one or the other of them struck the fatal blow;

(3) however, in this case, it was clear that from the beginning in spite of the error in the charge the appellant knew perfectly well what the case for the prosecution was going to be and what in fact it was. In the circumstances it would be very difficult to say that the error in the charge as such occasioned a failure of justice;

(4) apart from the provisions of section 422 of the Criminal Procedure Code the case fell within the proviso to section 29(1) of the Courts Ordinance to the effect that the Court of Appeal might notwithstanding that it was of the opinion that a point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if it considered that no substantial miscarriage of justice had occurred.

*Cases referred to :—*

(1) *Mahbub Singh v. R.* L.R. 72 I.A. 148.

(2) *Waryam Singh v. R.* I.L.R. 22 Lah. 432.

(3) *Bishuwanath v. R.* A.I.R. 1946 All. 153.

(4) *R. v. Thompson* 9 Cr. App. R. 252.

(5) *R. v. Ballysingh* 37 Cr. App. R. 28.

## COURT OF APPEAL.

*Jag-Jit Singh* for the appellant: Prosecution invoked Penal Code s. 34 but did not frame charge under that section. No suggestion of offence committed in furtherance of a common intention. **Ratanlal** 18th Edn. pp. 69, 771 and 821. **Bishuwanath** v. R.[3] No evidence of common intention, pre-arranged plan and motive. R. v. **Sathiah** (1938) M.L.J. 30; (1938) S.S.L.R. 268.

The learned trial Judge dealt with the question of common intention inadequately and incorrectly. He did not use the expression "common intention." **Mahbub** Singh v. R.[1] Question put to assessors: "Are you satisfied it was the accused who inflicted the fatal blow?" Answer: "Yes" (by one assessor). Questions to assessors ignored the question of common intention. Statements made in course of Police investigation were admitted in contravention of Criminal Procedure Code (Cap. 6) s. 113(i). Did not comply with Criminal Procedure Code s. 113(ii) — as read with Evidence Ordinance s. 145. **Muthusamy** v. **Public Prosecutor** (1948) M.L.J. 57. Learned Judge was wrong as to burden of proof, did not attach sufficient importance to discrepancies, was wrong as to dying declaration (Evidence Ordinance s. 118); was deceased mentally competent then to say anything? Assessors' answers not properly considered (Criminal Procedure Code ss. 197 & 198). Assessors insufficiently directed on issue of identity. First information report not produced. Contradictory evidence of witness not dealt nor mentioned in summing-up not grounds of judgment. Motive was never established, though suggested by prosecution.

*B. Sheldon* (Federal Counsel) for the respondent: (Called on as to common intention and use made of statements to the Police). Conceded that statements were not served. Criminal Procedure Code s. 113(ii) and Evidence Ordinance s. 145 were complied with in their entirety. Distinction D.W. 2 who did not admit matters put to him and D.W. 3 who did admit. Penal Code on common intention, admittedly charge contained no reference to Penal Code s. 34 but there had been a preliminary enquiry which made it quite clear that prosecution case was based on a joint attack. **Ratanlal** p. 69. Courts Ordinance s. 29 cf. Criminal Appeal Act 1907 s. 4. No substantial miscarriage of justice. **Cooray** v. **R.** (1953) A.C. 407, 419; **R. v. Cohen** 3 Cr. App. R. 180; **R. v. Harris** 5 Cr. App. R. 285; R. v. **Thompson.**[4] The point as to charge being defective was not taken at the trial. **R. v. Ballysingh.**[5] Other cases on miscarriage of justice: **R. v. Taylor** 25 Cr. App. R. 46; **R. v. Woolmington** 25 Cr. App. R. 96; **R. v. Bishirgian** 29 Cr. App. R. 182, 188. Common intention may arise at time of fight: **Dost Mohd.** v. R. A.I.R. 1942 Pesh. 29, 32; **Mahbub Singh** v. **R.**[1]; **Ghosh** v. **R.** 41 T.L.R. 27; **Waryam Singh** v. **R.**[2] On proper direction submit answers of assessors — and Court — would have been the same. Ask to apply proviso to Courts Ordinance s. 29.

*Jag-Jit Singh* in reply: Prosecution could have amended the charge — but they did not. And it was defective. By law there is nothing to show common intention. If learned trial Judge misdirects assessors he must be held to have misdirected himself.

The judgment of the Court was delivered by :—

**Thomson C.J.** : — This appellant was tried and convicted at the Kedah Assizes on the following charge :—

"That you on the 27th day of May, 1956, at about 7.00 p.m. at Feeder 14, Sanglang, in the District of Kubang Pasu, in the State of Kedah, committed murder by causing the death of one Inin s/o Endin Kelai and you thereby committed an offence punishable under section 302 of the Penal Code."

He appealed against his conviction and we dismissed his appeal. In doing so, however, we intimated that we would give our reasons at a later stage.

The prosecution case was that the appellant Osman, the deceased Inin and a man named Hashim all lived in the same small village on the banks of an irrigation canal. It was throughout treated as a matter of common knowledge that the people here are subject to considerable Siamese influence and that among them "Man" is a common abbreviation of the name "Osman" and "Chin" a common abbreviation of the name "Hashim". There was evidence, which may or may not have been true but which was certainly not directly contradicted, to the effect that on the evening of 27th May at a time which was not clearly established the deceased left his house to go to a nearby shop. Some time later shouts were heard from him and a sound which was described as "pok" and he was found sitting on the canal bund suffering from a head injury. In reply to questions as to who had injured him he named the appellant and Hashim. Immediately after the sound "pok" was heard and immediately before the deceased was found injured a lad of seventeen years of age (Othman bin Din) had seen the accused and Hashim running on the bund and immediately afterwards saw the deceased lying on the ground. The deceased died later in the evening and on subsequent medical examination was found to have died from a fracture of the skull and intracranial haemorrhage caused by a blow probably with a heavy instrument with a blunt edge such as the back of a "parang" or the edge of a small axe. There was evidence of one blow only but it was said that a considerable amount of force must have been used. Later in the evening the appellant was arrested at his own house, but Hashim could not be found and, indeed, would appear not to have been found up to the time of the trial. In this connection it is to be observed that the scene of the incident is about 12 miles from the Siamese border.

The defence was one of *alibi*. The appellant denied all knowledge of the affair and said that at all material times he was in his own house. His evidence was corroborated by the evidence of his father-in-law, a friend and his wife.

With regard to the prosecution evidence it is to be observed at this stage that only one blow was struck and there was no evidence as to who struck that blow. There was evidence, however, which, if believed, showed that the blow was struck by either the appellant or by Hashim, and there was evidence from which the inference could be drawn that when the blow was struck the appellant and Hashim were acting with a common intention to cause the death of the deceased. There was, however, nothing to show that it was one rather than the other of them who actually struck the blow. In the circumstances the prosecution were forced to

rely on section 34 of the Penal Code, which reads as follows :—

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

The learned trial Judge dealt with the case as follows.

In the first place he asked the Assessors "Having heard all the evidence are you satisfied that it was the accused who inflicted the fatal injury described by the Doctor upon the deceased?" He prefaced that question, however, by the following observations :—

"I have not incorporated into the questions the issue of joint liability or common intention as it is the rule of law that if two persons jointly attack another and kill him then it matters not which one of them actually strikes the fatal blow. In such cases each one of them is equally guilty in just the same way as if there were only a single assailant. I have therefore put the question merely this way —"

To that question the first Assessor answered "No" and apparently gave as his reason for that answer that he was not satisfied with the prosecution evidence. The second Assessor answered "Yes" and gave as his reason that the evidence given by the prosecution witnesses was true. The second question to the Assessors was "If your answer to the first question is in the affirmative, are you satisfied that at the time the accused inflicted the wound he either intended to cause death or to cause such grievous injury as would in the natural course of events result in death?" To that question the first Assessor gave no answer and the second Assessor answered "Yes".

The trial Judge then announced that he agreed with the second Assessor and proceeded to deliver a short judgment, in the course of which he stated that he believed the evidence of the prosecution witnesses and was satisfied that the defence of *alibi* was not true. He concluded as follows :—

"I believed the evidence of the prosecution witnesses and am satisfied and find as a fact that the accused and Chin jointly attacked the deceased and that one of them dealt the blow which resulted in the fatal injury to the deceased.

I have no reasonable doubt in my mind that the accused jointly committed the offence with which he is charged and I convict him of murder."

The conviction was attacked on a number of grounds, some of which in our opinion were of little substance.

It was said that wrongful use was made by the prosecution of statements made by the defence witnesses in the course of the Police investigation to cross-examine the witnesses. It was, however, conceded in the course of argument that in fact the provisions of section 113(ii) of the Criminal Procedure Code and section 145 of the Evidence Ordinance were fully complied with in this connection.

Again it was said that the trial Judge erred in his statements relating to the burden of proof. With regard to this we can only say that having examined the summing-up and the judgment we are unable to agree.

Then a complaint was made that the trial Judge attached insufficient weight to certain admitted discrepancies in the evidence of the prosecution witnesses. It is clear that the Judge was well aware of these discrepancies and we see no ground for saying that he paid inadequate attention to them or attached to them insufficient weight.

Then it was said that the trial Judge failed to exercise sufficient caution in considering the statements made by the deceased before his death as to the cause of his injuries. It seems to us that the learned trial Judge exercised very great caution in this connection and here it is to be borne in mind that the local law as to dying declarations is materially different from the law in England. By section 32 of the Evidence Ordinance statements by a deceased person as to the circumstances of the transaction which resulted in his death are admissible irrespective of whether the person who made them was or was not at the time when they were made under expectation of death.

Then it was said that the Judge should not have accepted the answer given by the second Assessor to the second question because that answer was not accompanied by any reason. Here we felt it was not necessary to decide the point because even if it might have succeeded it was impossible to see how the fact (if indeed it were a fact) that the Judge was unaware of the reasons which had led this Assessor to give the answer he did give could have produced any miscarriage of justice.

Then it was said that the Judge erred in law in not considering such reasons as were given by the Assessors. For this complaint we can find no justification for it is very clear from his judgment that the Judge did consider what was said by the Assessors.

Then it was said that the trial Judge did not take sufficient care as to the question of the identity of the accused. With regard to this all we have to say is that the evidence was discussed at length on the basis of the incident having taken place at about 7 p.m. when it is a matter of common knowledge that darkness has set in.

Then it was said that the trial Judge failed to direct his mind to the failure on the part of the prosecution to produce the first information report

relating to the offence. We were not told the contents of this report and we have heard no suggestion as to what effect the failure to produce it had on the trial.

Then it was said that with regard to the witness Din Klin, who is the mother of the deceased, the trial Judge omitted to direct the Assessors and himself on the point that in certain respects her evidence differed from the evidence which she gave at the Preliminary Enquiry. But the differences in question were not very material and in any event the Judge and the Assessors heard her evidence and heard her being cross-examined on her deposition and there is no reason to believe that they failed to consider what they heard.

The last point which we consider to be without substance is to the effect that the prosecution suggested that a girl named Puah had something to do with the crime and that the Judge's omission to direct his mind to the failure of the prosecution to call this girl as a witness resulted in a miscarriage of justice. The truth is that there was not a scrap of evidence to show that this girl had anything to do with the case and in the circumstances we fail to see why the fact that she was not called as a witness by either side calls for any consideration. It is true that one or two questions were asked about this girl by prosecuting counsel, but every answer that was given went to show that she had nothing whatever to do with the case.

There were, however, two grounds of appeal which in our opinion called for consideration.

One was that the Judge dealt with the question of common intention insufficiently and incorrectly and the other was that the prosecution having invoked the aid of section 34 of the Penal Code, on which indeed the whole case depended, the charge should have been framed under that section and that the failure to do so was a vital defect in the proceedings.

With regard to the question of how the trial Judge dealt with the question of common intention the relevant portions of his summing-up to the Assessors and of his judgment have already been quoted.

Frankly it must be said that perhaps the way in which he put the matter to the Assessors in his first question to them and in the observations leading up to that question was not a very happy one. In this connection, however, it must be remembered that he was endeavouring to state the point simply for the benefit of simple persons, and it may well be that he had in mind the following words of Sir Michael Foster [*Foster's Crown Law* (Ed. 1809) p. 351]:—

". . . . the mortal stroke, though given by one of the party is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike."

It is true, too, that in his judgment he does not say in terms that there was a common intention on the part of Hashim and the appellant to kill the deceased. He does, however, say that he is satisfied that the appellant and Hashim jointly attacked the deceased and that the appellant jointly committed the offence charged against him. When these words are read in conjunction with the portion in the summing-up relating to joint liability and common intention it seems to be abundantly clear that in using the expression "jointly" he meant and intended to convey that the two men were acting together in furtherance of a common intention. What he said is perhaps not a model of clear statement considered in the abstract, but it does support the conclusion that he neither misdirected himself nor the Assessors as to the true state of the law.

In this connection our attention was invited to the case of *Mahbub Singh v. King-Emperor*[1] which was a case where the prosecution relied on section 34 of the Penal Code. The facts of that case were, however, very different from the facts of the present case. In that case the appellant fired at and wounded a person for whose murder he was not tried and a person who was apparently acting with him fired at and killed the person for whose murder the appellant was tried. In the circumstances it was of vital importance, and their Lordships dealt with this at length, to differentiate between the case where two persons have a common intention and the case where two persons have the same intention or similar intentions. In the present case, however, the question of that distinction did not arise. It was a case of common intention or nothing, and in the circumstances there is no justification for saying that what was said by the trial Judge in his summing-up and in his judgment was such an insufficient statement of the law as to be fatal to the proceedings.

With regard to the complaint that in the circumstances of the present case the charge was defective because it was not framed with specific reference to section 34 of the Penal Code, it is to be observed that on this question the Courts in India are not in agreement.

In the Lahore case of *Waryam Singh v. The Crown*[2] it was held that section 34 does create any offence and accordingly it is not necessary to specify it in the charge in a case where it is relied on. The section is merely explanatory and embodies in the Code the ordinary commonsense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. On the other hand in the Allahabad case of *Bishuwanath*

*v. Emperor*[3] it was held that where the prosecution invokes the aid of section 34 for holding one person responsible for the result produced by the act of another it is necessary to frame a charge under that section, and that the omission to do so is a vital defect resulting in this that the accused can be held responsible only for the result of an act committed by himself.

It is difficult to ascertain the *ratio decidendi* of these two cases but it does not seem necessary to go further than a consideration of sections 152, 153 and 154 of the Criminal Procedure Code. Section 152 provides *inter alia* that every charge shall state the offence with which the accused is charged and shall mention the law and section of the law against which the offence is said to have been committed. Section 153 provides that the charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 154 reads as follows:—

"When the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter with which he is charged the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose."

We do not find it necessary to lay down any general rule as to whether, when the prosecution proposed to invoke the provision of section 34, it is necessary to specify that section of the Code in terms. On grounds of common fairness, however, where the prosecution are proposing to invoke the section the charge should make this clear to the accused. In a case of murder, for example, the interests of justice clearly require that the accused person should know whether the case against him is that he himself struck the fatal blow or whether it is that some other person struck the fatal blow but that he was acting at the time together with that other person and that the fatal blow was struck in furtherance of an intention which was common to them both. If this be not made clear it seems to us that the particulars stated in the charge "do not give the accused sufficient notice of the matter with which he is charged."

In the present case the charge erred against this principle. It simply stated that the accused committed murder by causing the death of the deceased. In itself it did not make it clear, or indeed even suggest, that what it was proposed to prove against the accused was not that he struck the blow that caused the death of the deceased but that he and Hashim were acting together with a common intention to kill the deceased and that in furtherance of that common intention one or the other of them (the prosecution was unable to say which) struck the fatal blow.

Having thus arrived at the conclusion that the charge was defective there only remains to be considered the question of whether that is fatal to the conviction or whether the matter comes within the provisions of section 422 of the Criminal Procedure Code which provides that no finding of a Court of competent jurisdiction shall be reversed on account of any error in the charge unless such error has occasioned a failure of justice.

Here it must be borne in mind that at the trial the appellant was represented by experienced counsel who had every opportunity of studying the depositions and before us both counsel agreed that the evidence which was in fact given by the prosecution witnesses at the trial did not depart in any material respect from the evidence they had given at the Preliminary Enquiry. On the depositions there was no room for doubt as to what the case for the prosecution was going to be and indeed was bound to be. If there had been any material departure from the depositions which altered the nature of the case against the appellant then his counsel would have had grave cause for complaint. It is admitted, however, that he had no cause for nor did he make any complaint in this regard. It is clear that from the beginning in spite of the error in the charge he knew perfectly well what the case for the prosecution was going to be and what in fact it was. In the circumstances it would be very difficult to say that the error in the charge as such occasioned a failure of justice.

Apart from the provisions of section 422 of the Criminal Procedure Code the case in our view clearly falls within the proviso to section 29(1) of the Courts Ordinance to the effect that the Court of Appeal may, notwithstanding that it is of the opinion that a point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. That proviso is the same as the proviso to section 4(1) of the Criminal Appeal Act 1907.

It is well settled that in a proper case the Court may act under that proviso in the English Act in the case of a defective indictment and in considering whether or not the Court should so act in such a case the test to be applied is whether the Court thinks that any embarrassment or prejudice has been caused to the appellant by the presentment of the indictment in the form in which it has been presented (see *R. v. Thompson*[4]; *R. v. Ballysingh*[5]).

Applying these tests in the present case we were satisfied that we should act under the proviso to section 29(1) for in our view the defence was not in any way embarrassed or prejudiced.

*Appeal dismissed.*